No. 14561

United States Court of Appeals
For the Ninth Circuit

YAKUTAT & SOUTHERN RAILWAY, a Corporation; LIBBY, McNEILL & LIBBY, a Corporation; and BELLINGHAM CANNING COMPANY, a Corporation, *Appellants,*

vs.

THE CITY OF YAKUTAT, *Appellee.*

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE

BRIEF OF APPELLEE

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PLEADINGS

This case is very similar to No. 14652. The court on April 7, 1955, consolidated them for purposes of argument.

This case commenced with the filing of an application on October 15, 1952, against real property then owned by Bellingham Canning Company. Attached to this application is the duplicate delinquent tax rolls of appellee for the tax years 1950 and 1951 (Tr. 15-18). These rolls are embodied in a notice that the rolls will be presented to the District Court for the Territory of Alaska for judgment of order of sale.

The Duplicate Delinquent Tax Rolls contain a statement of real and personal property, the valuation attributable to each, the tax due for each of the years, and the

aggregate penalty and aggregate interest, and grand total. The name of the reputed owner is stated as Bellingham Canning Co.

On the same October 15, 1952, the Objectors Yakutat & Southern Railway, Libby, McNeill & Libby, and Bellingham Canning Company, appeared with numerous objections, all of which are of the same type as this Court has disposed of or is considering in No. 14652.

These objections fall into three categories:

1. Technical objections as to manner and place of posting of notices, appointment of assessors, qualifications of assessors, etc.

2. Objection of excessive valuation between $187,625 fixed by the Board of Equalization, and $99,000 claimed by the owners, appellants herein.

3. Objection of bad faith valuation, on which no evidence was introduced by appellants, except insofar as the difference in valuation amounting to bad faith *per se.*

All pertinent minutes of appellee's Board of Trustees (City Council) and Board of Equalization were introduced in evidence (Tr. 27-64).

On the trial on May 10, 1954, the duplicate delinquent tax roll was admitted in evidence as Applicant's Exhibit No. 1 (Tr. 116). Page 5 of the Assessment Book was introduced as Applicant's Exhibit No. 2 (Tr. 116, and 190). Attorneys for all parties stipulated that the Objectors' witnesses would testify that the value of the real property was as stated in their objections (Tr. 116). Applicant admitted all the technical objections urged by

Objectors but claimed them to be immaterial (Tr. 116 and 193 *et seq.*). Ordinance No. 1 was stipulated into evidence (Tr. 116). On rebuttal the applicant proved an ordinance directing posting of notice of presentation of delinquent tax roll to District Court instead of publication, as permitted by Sec. 16-1-122 A.C.L.A. 1949 (Tr. 212-214).

On June 18, 1954, the trial court made its memorandum decision (Tr. 118) that objections were either lacking in merit or such as not to affect the substantial rights of the objectors, and granted the application (Tr. 128) on June 26, 1954. Objections thereon were heard on June 29, 1954, which resulted in a minute order overruling the objections and including an order that the trial court regarded as in evidence all evidence adduced by the property owners and applicant in the first case (No. 6581-A, Tr. 125). On July 28, 1954, the Objectors asked to have this minute order (of June 29, 1954) amended to show that applicant admitted the events alleged in the technical objections but denied the legal conclusions drawn therefrom by Objectors. The minute order was amended as Objectors requested.

STATEMENT OF THE CASE

The instant case and No. 14652 are so much alike that on the motion for new trial (Tr. 134) as well as on the motion for summary judgment (Tr. 112), the appellants urged the Doctrine of *Res Judicata.*

In view of the fact that these are *in rem* proceedings, we agree that the principle applies, although we do not agree with counsel's view of his result herein. The same

real property is involved in both cases. In No. 14652 (6581-A below, former appeal No. 13455 in this Court, and reported at 206 F.(2d) 612), the objectors and appellants are the railway and Libby. In the instant case, the objectors-appellants are the same for the first tax year commencing June 1, 1950, to May 5, 1951, whereupon the objector-appellant becomes Bellingham—in this sense Bellingham is the successor of Libby (the railway being a wholly owned subsidiary of the corporation Libby), especially since it seeks to reap the fruits of its predecessors' work in No. 14652. This explanation is made to show that the Doctrine of the Law of the Case is applicable here for all the technical objections advanced by the appellants in both cases.

Accordingly, no duplication of statement of facts and law on such points is made, for if the case No. 14652 falls on the technical objections, this one equally falls.

The two cases do differ in that the appellants in the instant case appeared before the Board of Equalization at an agreeable time and in an agreeable manner. In the former case, no appearance with real evidence had been made before the Board of Equalization, and accordingly the trial court struck all the objectors' evidence because they had not exhausted their administrative remedy.

The appearance of the objectors herein before the Board of Equalization appears at Tr. 58 *et seq.,* and was rejected by the Board. No explanation appears for the rejection from the appellants either before the Board or in the trial court. The appellee states cause of rejection as based on the report of the engineer Toner show-

ing a valuation of an almost identical amount for real property, and the evidence that had already been presented to the trial court in the other case (Tr. 58 *et seq.*). The appearance of the property owners before the Board showed several different figures of valuation.

The other aspect whereby this case differs from No. 14652 (on the previous appeal 13455), relates to the notice of presentation of the delinquent tax roll to the District Court. Ordinance No. 1 required publication in a newspaper of general circulation. An ordinance amendment, the text of which was not introduced in evidence, had been made (Tr. 212-213) before the "last case" (referring to No. 6581-A, No. 13455, No. 14652, Tr. DC record March 6, 1952). The discovery of the exact terms of this ordinance has not been pursued on a deposition after appeal. The basis for such ordinance amendment appears at Sec. 16-1-122 ACLA 1949, where a town has less than 1,500 population and no newspaper of general circulation.

As in the other case, no evidence was presented by appellants directly showing bad faith in the valuation of their property, and the trial court overruled the charge in its memorandum decision (Tr. 118).

The charge of bad faith in valuing the property was considered at length in No. 14652 by the trial court and overruled (See that record p. 38-40).

The part payment of tax was made by Appellants' attorney in exactly the same manner as in the other case—payment in full according to appellants' valuation coupled with a "condition" that such payment was in full.

The payment was accepted by the appellee without the condition of compromise (Tr. 95).

The Applicant's Exhibit No. 1 (Tr. 15, 116) states the amount due for balance of real property taxes against real property plus penalty and interest.

The Applicant's Exhibit No. 2 (Tr. 16, 116, 190) eliminates any possibility that personal property is involved herein, as a matter of computation.

The final judgment of order of sale is based on the computation of balance due of real property taxes (plus penalty and interest on principal balance due) and costs.

From such judgment, this appeal is taken.

QUESTIONS PRESENTED

1. Technical objections as to the manner and place of posting notices of presentation of delinquent tax roll, appointment of assessors, qualification of assessors, etc., do not affect the substantial rights of the objectors, and this case should be governed by the rule announced in No. 13455, 206 F.(2d) 612. This is appellants' first, second, third, and part of the fifth points (Brief 15).

2. Libby, McNeill & Libby for 1950 did not appear with evidence before the Board of Equalization and should not now be permitted to try any question of excessive valuation. Bellingham Canning Company appeared before the Board but then and in the trial did not carry the burden of showing the difference in valuation to be anything more than a difference of opinion and thus not affecting their substantial rights. Appel-

lants offered no evidence of bad faith valuation. This is appellants' fourth point.

3. The ordinance allows interest.

ARGUMENT

Again counsel shows his dislike of the statute upon which this proceeding is based. This statute is Title 16, Chap. 1, Article 7, entitled ENFORCEMENT OF TAX LIENS ON REAL PROPERTY, A.C.L.A. 1949. Throughout both these cases, counsel has wholly ignored any explanation of how Sec. 16-1-124 fits into our Governments. This section, insofar as material here, follows:

> "OBJECTIONS TO ASSESSMENT, TAX OR ORDER OF SALE: FORM AND CONTENTS HEARING: EVIDENCE: DECISION AND RELIEF: COSTS. Any person owing, or having any legal or equitable interest in, or a lien upon any tract listed in said duplicate delinquent roll, may appear and present at the time of hearing before the court, his objection, and contest the validity of the assessment or tax on such property, or the granting of the order of the sale thereof. Such objection shall be in writing and specify the grounds of objection to the assessment or tax on the particular tract represented in such objection and the court will hear and determine such objection and render such decision thereon as may be legal and just. At such hearing the duplicate tax roll shall be *prima facie* evidence of the regularity and legality of the assessment and levy of the tax and that the same is unpaid, and no objection to the valuation of the property, the manner of the assessment and levy of the tax, or any of the subsequent proceedings shall be entertained by the court which does not effect the substantial rights of the party interposing the objection * * * "

In the other case on the first appeal this Court found at 206 F.(2d) 612, 616: "Ordinarily, the errors noted would not require reversal of the order in toto."

Counsel cites some very good law that tax statutes are to be strictly construed. Appellants make no claim that the statute is invalid or unconstitutional. We can only conclude that this statute is to be construed strictly liberally.

First Question

Technical objections as to the manner and place of posting notices of presentation of delinquent tax roll, appointment of assessors, qualification of assessors, etc., do not affect the substantial rights of the objectors, and this case should be governed by the rule announced in No. 13, 455, 206 F.(2d) 612.

Counsel urges the same idea in his third point as *"res judicata."*

This proceeding started out as one against real property owned by Bellingham Canning Co. (Tr. 16). Libby, McNeill & Libby and its wholly owned subsidiary (former record No. 13455, p. 286) Yakutat & Southern Railway appeared voluntarily for its *sub modo* interest for the tax year 1950.

Identical real property is involved in both cases. The valuations are identical. Identical procedure was used by the appellee for all three tax years except as follows:

1. For the tax year 1951, Bellingham Canning Company appeared before the Board of Equalization with evidence. While the appearance was informal, all parties were satisfied with the manner (Tr. 173).

2. Shortly after May 7, 1951, the appellee had adopted an ordinance permitting *posting only* of the notices of presentation of the delinquent tax roll to the District Court (Tr. 247, where the testimony of Mallott identifies the adoption as "shortly after the last case in court * * * the 1949 cases * * * ").

3. The application has attached to it a duplicate delinquent tax roll segregating the personalty from the realty.

On the technical objections, therefore, we suggest that the Doctrine of the Law of the Case is applicable for 1950 which concerns Libby. And that the Doctrine is similarly applicable to 1951 because Bellingham is successor in interest.

While this is not a literal application of the Doctrine (because after all this is a different case than No. 14652 and the former appeal No. 13455), still the idea is the same—a court should take judicial notice of its ruling in a former case involving the same issues of law and fact.

Accordingly, appellee adopts by reference the decisional authorities stated in its answering brief in No. 14652, which commence at page 22, on the Doctrine of the Law of the Case. This permits the elimination of a large number of pages of copy work such as constitutes almost verbatim the major portion of counsel's argument in this case carried over from No. 14652.

Second Question—1950

LIBBY for 1950 did not appear with evidence before the Board of Equalization and should not now be permitted to try any question of excessive valuation.

This is effectively disposed of in the other brief. See page 26.

We do not think Chief Justice Marshal should be so ungratefully treated at page 39 as to attribute to him out of context "the power to tax involves the power to destroy." Especially since Justice Holmes said quite some time ago of this phrase: "Not while this Court sits."

Second Question As to Bellingham—1951

Bellingham appeared before the Board of Equalization but then and in the trial court did not carry the burden of showing the difference in valuation to be anything more than a difference of opinion and thus not affecting their substantial rights.

On the first trial of the other case (No. 13455), the trial court considered a similar situation, and found adversely to appellants. See page 28 of our brief in No. 14652. Obviously there was nothing else the trial court could have done, because it was confronted with the evidence of the engineer-appraiser Toner that the real property was worth $183,000!

No direct evidence is offered that the difference in valuations between the appellee and the appellants is attributable to bad faith of appellee—appellants could only be said to infer that the difference is malice *per se*. The inference falls automatically when the trial court finds that the difference is attributable only to a difference of opinion.

Third Question

The ordinance allows interest.

The ordinance at section 12 takes advantage of the

enabling act, Sec. 16-1-112 A.C.L.A. 1949, to provide for interest on delinquent taxes of 1% monthly. The ordinance is narrative in form. Apparently this is sufficient to satisfy the Alaska court as to the Alaska practice. If the section were not enactive in nature, there would have been no reason for the words "from the date of such delinquency." The section could have been stated in better form, but certainly there is no doubt in it that interest is provided for.

CONCLUSION

We state very frankly that we are tired from reading counsel's briefs. From counsel's viewpoint, we get a strong impression that neither the Board of Equalization nor the trial court did one single thing correctly, except allow him more time to docket this appeal. We suggest that the utter contempt of mind counsel has for appellee (and the support given it by the trial court) is expressed in his desire to emasculate a political subdivision of Alaska, appearing in his final statement at page 48:

> "Appellee should have refunded Appellants' remittances if it did not accept that sum in full payment of Appellants' taxes."

The order of sale, being in conformity with what this Court has decided, should be affirmed.

Respectfully submitted,

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April 14, 1955

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